

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

JAMES M. STREDWICK,	)	
	)	No. CV-10-5035-JPH
Plaintiff,	)	
	)	ORDER GRANTING DEFENDANT'S
v.	)	MOTION FOR SUMMARY JUDGMENT
	)	
MICHAEL J. ASTRUE, Commissioner	)	
of Social Security,	)	
	)	
Defendant.	)	
	)	
	)	

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BEFORE THE COURT are cross-motions for summary judgment noted for hearing without oral argument on February 25, 2011 (Ct. Rec. 11, 13). Attorney Randy J. Fair represents plaintiff. Special Assistant United States Attorney Lisa Goldoftas represents the Commissioner of Social Security (Commissioner). The parties have consented to proceed before a magistrate judge (Ct. Rec. 3). After reviewing the administrative record and the briefs filed by the parties, the court **grants** defendant's motion for summary judgment (Ct. Rec. 13) and **denies** plaintiff's motion for summary judgment (Ct. Rec. 11).

**JURISDICTION**

Plaintiff protectively filed concurrent applications for disability insurance benefits (DIB) and supplemental security income benefits (SSI) on May 2, 2005, alleging onset as of April 29, 2005 (Tr. 59-63, 67, 219-221). The applications were denied

1 initially and on reconsideration (Tr. 25-26, 29-32, 215-216).

2 At a hearing before Administrative Law Judge (ALJ) Richard A.  
3 Say on October 1, 2007, plaintiff, represented by counsel, and a  
4 vocational expert (VE) testified (Tr. 228-249). On October 25,  
5 2007, the ALJ issued an unfavorable decision (Tr. 12-21). The  
6 Appeals Council denied Mr. Stredwick's request for review on March  
7 4, 2010 (Tr. 4-6). Therefore, the ALJ's decision became the final  
8 decision of the Commissioner, which is appealable to the district  
9 court pursuant to 42 U.S.C. § 405(g). Plaintiff filed this action  
10 for judicial review pursuant to 42 U.S.C. § 405(g) on March 25,  
11 2010 (Ct. Rec. 1).

#### 12 **STATEMENT OF FACTS**

13 The facts have been presented in the administrative hearing  
14 transcript, the ALJ's decision, and the briefs of the parties.  
15 They are briefly summarized here.

16 Plaintiff was 50 years old at onset and 52 at the hearing  
17 (Tr. 229, 233). He has a high school education and has worked as a  
18 pipe fitter. Mr. Stredwick last worked in April 2005 (Tr. 67, 70,  
19 235). When he applied for benefits plaintiff lived with his  
20 mother. She cooked and cleaned (Tr. 85). At the hearing Mr.  
21 Stredwick testified his mother died and he lived with his  
22 girlfriend (Tr. 234). His activities include watching television,  
23 driving, shopping, feeding and playing with his cat, reading,  
24 washing dishes, and occasionally cooking (Tr. 83-84, 86-87, 236-  
25 237). He is able to lift 30 pounds, sit for an hour, and stand and  
26 walk for 10-15 minutes (Tr. 237-238). He had pain in both knees at  
27 the hearing (Tr. 244).

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1 impairments acknowledged by the Commissioner to be so severe as to  
2 preclude substantial gainful activity. 20 C.F.R. §§  
3 404.1520(a)(4)(ii), 416.920(a)(4)(ii); 20 C.F.R. § 404 Subpt. P,  
4 App. 1. If the impairment meets or equals one of the listed  
5 impairments, plaintiff is conclusively presumed to be disabled.  
6 If the impairment is not one conclusively presumed to be  
7 disabling, the evaluation proceeds to the fourth step, which  
8 determines whether the impairment prevents plaintiff from  
9 performing work which was performed in the past. If a plaintiff is  
10 able to perform previous work, that Plaintiff is deemed not  
11 disabled. 20 C.F.R. §§ 404.1520(a)(4)(iv), 416.920(a)(4)(iv). At  
12 this step, plaintiff's residual functional capacity ("RFC")  
13 assessment is considered. If plaintiff cannot perform this work,  
14 the fifth and final step in the process determines whether  
15 plaintiff is able to perform other work in the national economy in  
16 view of plaintiff's residual functional capacity, age, education  
17 and past work experience. 20 C.F.R. §§ 404.1520(a)(4)(v),  
18 416.920(a)(4)(v); *Bowen v. Yuckert*, 482 U.S. 137 (1987).

19 The initial burden of proof rests upon plaintiff to establish  
20 a *prima facie* case of entitlement to disability benefits.  
21 *Rhinehart v. Finch*, 438 F.2d 920, 921 (9<sup>th</sup> Cir. 1971); *Meanel v.*  
22 *Apfel*, 172 F.3d 1111, 1113 (9<sup>th</sup> Cir. 1999). The initial burden is  
23 met once plaintiff establishes that a physical or mental  
24 impairment prevents the performance of previous work. *Hoffman v.*  
25 *Heckler*, 785 F.3d 1423, 1425 (9<sup>th</sup> Cir. 1986). The burden then  
26 shifts, at step five, to the Commissioner to show that (1)  
27 plaintiff can perform other substantial gainful activity and (2) a  
28 "significant number of jobs exist in the national economy" which

1 plaintiff can perform. *Kail v. Heckler*, 722 F.2d 1496, 1498 (9<sup>th</sup>  
2 Cir. 1984); *Tackett v. Apfel*, 180 F.3d 1094, 1099 (1999).

### 3 STANDARD OF REVIEW

4 Congress has provided a limited scope of judicial review of a  
5 Commissioner's decision. 42 U.S.C. § 405(g). A Court must uphold  
6 the Commissioner's decision, made through an ALJ, when the  
7 determination is not based on legal error and is supported by  
8 substantial evidence. See *Jones v. Heckler*, 760 F.2d 993, 995 (9<sup>th</sup>  
9 Cir. 1985); *Tackett*, 180 F.3d at 1097 (9<sup>th</sup> Cir. 1999). "The  
10 [Commissioner's] determination that a plaintiff is n  
11 ot disabled will be upheld if the findings of fact are supported  
12 by substantial evidence." *Delgado v. Heckler*, 722 F.2d 570, 572  
13 (9<sup>th</sup> Cir. 1983) (*citing* 42 U.S.C. § 405(g)). Substantial evidence  
14 is more than a mere scintilla, *Sorenson v. Weinberger*, 514 F.2d  
15 1112, 1119 n. 10 (9<sup>th</sup> Cir. 1975), but less than a preponderance.  
16 *McAllister v. Sullivan*, 888 F.2d 599, 601-602 (9<sup>th</sup> Cir. 1989);  
17 *Desrosiers v. Secretary of Health and Human Services*, 846 F.2d  
18 573, 576 (9<sup>th</sup> Cir. 1988). Substantial evidence "means such  
19 evidence as a reasonable mind might accept as adequate to support  
20 a conclusion." *Richardson v. Perales*, 402 U.S. 389, 401 (1971)  
21 (citations omitted). "[S]uch inferences and conclusions as the  
22 [Commissioner] may reasonably draw from the evidence" will also be  
23 upheld. *Mark v. Celebrezze*, 348 F.2d 289, 293 (9<sup>th</sup> Cir. 1965). On  
24 review, the Court considers the record as a whole, not just the  
25 evidence supporting the decision of the Commissioner. *Weetman v.*  
26 *Sullivan*, 877 F.2d 20, 22 (9<sup>th</sup> Cir. 1989) (*quoting Kornock v.*  
27 *Harris*, 648 F.2d 525, 526 (9<sup>th</sup> Cir. 1980)).

28 It is the role of the trier of fact, not this Court, to

1 resolve conflicts in evidence. *Richardson*, 402 U.S. at 400. If  
2 evidence supports more than one rational interpretation, the Court  
3 may not substitute its judgment for that of the Commissioner.  
4 *Tackett*, 180 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579  
5 (9<sup>th</sup> Cir. 1984). Nevertheless, a decision supported by substantial  
6 evidence will still be set aside if the proper legal standards  
7 were not applied in weighing the evidence and making the decision.  
8 *Browner v. Secretary of Health and Human Services*, 839 F.2d 432,  
9 433 (9<sup>th</sup> Cir. 1987). Thus, if there is substantial evidence to  
10 support the administrative findings, or if there is conflicting  
11 evidence that will support a finding of either disability or  
12 nondisability, the finding of the Commissioner is conclusive.  
13 *Sprague v. Bowen*, 812 F.2d 1226, 1229-1230 (9<sup>th</sup> Cir. 1987).

#### 14 **ALJ'S FINDINGS**

15 The ALJ found plaintiff was insured through October 12, 1954<sup>1</sup>  
16 (Tr. 12, 14), which is incorrect. SSI records show Mr. Stredwick's  
17 last insured date for DIB purposes is December 31, 2008 (Tr. 80).  
18 At step one the ALJ found plaintiff did not engage in SGA after  
19 onset (Tr. 14). At steps two and three, he found plaintiff suffers  
20 from the medically determinable impairments of degenerative joint  
21 disease of the right hip, status post hip replacement,  
22 degenerative disk disease (DDD) of the lumbar region of the spine,  
23 degenerative joint disease (DJD) of the right knee and status post  
24 pituitary resection with ongoing treatment, impairments that are  
25 severe but that do not meet or medically equal the severity of the  
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27 <sup>1</sup>The ALJ mistakenly lists plaintiff's birthday as his last  
28 insured date (see, e.g., Tr. 98).

1 Listings (Tr. 14-15). The ALJ assessed an RFC for a range of light  
2 work (Tr. 15). He found plaintiff less than fully credible (Tr.  
3 17). At step four, ALJ Say found plaintiff is unable to perform  
4 his past work (Tr. 19, 245). At step five, relying on the VE's  
5 testimony, he found Mr. Stredwick can work as a photograph  
6 finisher, small products assembler, and seedling sorter (Tr. 20-  
7 21, 246-247). Accordingly, at step five the ALJ found plaintiff is  
8 not disabled as defined by the Social Security Act (Tr. 21).

#### 9 ISSUES

10 Plaintiff contends the Commissioner erred when he weighed the  
11 medical evidence, namely, the opinion of treating doctor  
12 Christopher Kontogianis, M.D., assessed credibility, and made his  
13 step five findings (Ct. Rec. 12 at 5, 8-15). Asserting the ALJ's  
14 decision is supported by substantial evidence and free of legal  
15 error, the Commissioner asks the Court to affirm (Ct. Rec. 14 at  
16 4).

#### 17 DISCUSSION

##### 18 A. Weighing medical evidence

19 In social security proceedings, the claimant must prove the  
20 existence of a physical or mental impairment by providing medical  
21 evidence consisting of signs, symptoms, and laboratory findings;  
22 the claimant's own statement of symptoms alone will not suffice.  
23 20 C.F.R. § 416.908. The effects of all symptoms must be evaluated  
24 on the basis of a medically determinable impairment which can be  
25 shown to be the cause of the symptoms. 20 C.F.R. § 416.929. Once  
26 medical evidence of an underlying impairment has been shown,  
27 medical findings are not required to support the alleged severity  
28 of symptoms. *Bunnell v. Sullivan*, 947 F.2d 341, 345 (9<sup>th</sup> Cr.

1 1991).

2 A treating physician's opinion is given special weight  
3 because of familiarity with the claimant and the claimant's  
4 physical condition. *Fair v. Bowen*, 885 F.2d 597, 604-05 (9<sup>th</sup> Cir.  
5 1989). However, the treating physician's opinion is not  
6 "necessarily conclusive as to either a physical condition or the  
7 ultimate issue of disability." *Magallanes v. Bowen*, 881 F.2d 747,  
8 751 (9<sup>th</sup> Cir. 1989)(citations omitted). More weight is given to a  
9 treating physician than an examining physician. *Lester v. Chater*,  
10 81 F.3d 821, 830 (9<sup>th</sup> Cir. 1995). Correspondingly, more weight is  
11 given to the opinions of treating and examining physicians than to  
12 nonexamining physicians. *Benecke v. Barnhart*, 379 F.3d 587, 592  
13 (9<sup>th</sup> Cir. 2004). If the treating or examining physician's opinions  
14 are not contradicted, they can be rejected only with clear and  
15 convincing reasons. *Lester*, 81 F.3d at 830. If contradicted, the  
16 ALJ may reject an opinion if he states specific, legitimate  
17 reasons that are supported by substantial evidence. See *Flaten v.*  
18 *Secretary of Health and Human Serv.*, 44 F.3d 1453, 1463 (9<sup>th</sup> Cir.  
19 1995).

20 In addition to the testimony of a nonexamining medical  
21 advisor, the ALJ must have other evidence to support a decision to  
22 reject the opinion of a treating physician, such as laboratory  
23 test results, contrary reports from examining physicians, and  
24 testimony from the claimant that was inconsistent with the  
25 treating physician's opinion. *Magallanes v. Bowen*, 881 F.2d 747,  
26 751-52 (9<sup>th</sup> Cir. 1989); *Andrews v. Shalala*, 53 F.3d 1035, 1042-43  
27 (9<sup>th</sup> Cir. 1995).

28 *Lumbar DDD*. In May 2005, treating surgeon Christopher



1 Kontogianis, M.D., observes tests show some narrowing at L5/S1 and  
2 degenerative changes "but nothing that would require any specific  
3 intervention at this time" (Tr. 155).

4 *Right hip.* On August 3, 2005, plaintiff was hospitalized for  
5 and underwent right hip replacement. On August 9, 2005, he was  
6 discharged home (Tr. 144). On August 26, 2005, about three weeks  
7 after surgery, Dr. Kontogianis opined that, by April, plaintiff  
8 would probably be able to alternate sitting and standing. He might  
9 always require an assistive device, and he will always have  
10 restricted motion in the right hip (Tr. 153).

11 *Knee problems.* In November 2005, Dr. Kontogianis notes [three  
12 months after surgery] plaintiff has no pain or complications  
13 following hip replacement, but is having left knee problems (Tr.  
14 162)[It appears the doctor meant right knee; see *supra*.] A right  
15 knee MRI in February 2006 revealed a small tear in the lateral  
16 meniscus. Dr. Kontogianis opined immediate surgical intervention  
17 was not required. Plaintiff elected to "follow a course of  
18 observation" (Tr. 205). As of the hearing plaintiff had not had  
19 this surgery.

20 Also in February 2006, Dr. Kontogianis opined plaintiff has  
21 been unable to perform any gainful employment, especially the type  
22 of work that would be performed by a pipe fitter, since mid-April  
23 2005 (Tr. 208).

24 By April 2006, five to seven days a week plaintiff performs  
25 cardiovascular and strength training workouts for an hour (Tr.  
26 194), according to the records of a treating ARNP.

27 In June 2006, Dr. Kontogianis opined plaintiff would be able  
28 to perform sedentary work once treatment was complete (Tr. 211).

1 He lists as permanent restrictions no ladders, stairs, squatting,  
2 or prolonged standing, and limited carrying and lifting (Id). By  
3 October 27, 2006, Dr. Kontogianis observes plaintiff walks with a  
4 normal gait and range of motion is "excellent" (Tr. 207). Mr.  
5 Stredwick is instructed to return next year.

6 On October 1, 2007, plaintiff took three prescribed  
7 medications, all related to post (1990) pituitary gland surgery  
8 (Tr. 184, 214, 235).

9 The Commissioner asserts the ALJ's reasons for rejecting Dr.  
10 Kontogianis's contradicted opinion are specific and supported by  
11 the evidence: the three opinions plaintiff cites are contradicted  
12 by the doctor's own examination results, and they are inconsistent  
13 with the rest of the evidence (Ct. Rec. 14 at 9). Plaintiff  
14 asserts because they are the treating physician's opinions, the  
15 ALJ should have credited them.

16 While plaintiff is correct that the opinion of a treating  
17 physician generally is entitled to the greatest weight, such  
18 opinions are not binding as to either the existence of an  
19 impairment or the ultimate disability determination. *Tonapetyan v.*  
20 *Halter*, 242 F.3d 1144, 1148 (9<sup>th</sup> Cir. 2001).

21 To further aid in weighing the conflicting medical evidence,  
22 the ALJ evaluated plaintiff's credibility and found him less than  
23 fully credible (Tr. 17). Credibility determinations bear on  
24 evaluations of medical evidence when an ALJ is presented with  
25 conflicting medical opinions or inconsistency between a claimant's  
26 subjective complaints and diagnosed condition. See *Webb v.*  
27 *Barnhart*, 433 F.3d 683, 688 (9<sup>th</sup> Cir. 2005).

28 It is the province of the ALJ to make credibility

1 determinations. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9<sup>th</sup> Cir.  
2 1995). However, the ALJ's findings must be supported by specific  
3 cogent reasons. *Rashad v. Sullivan*, 903 F.2d 1229, 1231 (9<sup>th</sup> Cir.  
4 1990). Once the claimant produces medical evidence of an  
5 underlying medical impairment, the ALJ may not discredit testimony  
6 as to the severity of an impairment because it is unsupported by  
7 medical evidence. *Reddick v. Chater*, 157 F.3d 715, 722 (9<sup>th</sup> Cir.  
8 1998). Absent affirmative evidence of malingering, the ALJ's  
9 reasons for rejecting the claimant's testimony must be "clear and  
10 convincing." *Lester v. Chater*, 81 F.3d 821, 834 (9<sup>th</sup> Cir. 1995).  
11 "General findings are insufficient: rather the ALJ must identify  
12 what testimony not credible and what evidence undermines the  
13 claimant's complaints." *Lester*, 81 F.3d at 834; *Dodrill v.*  
14 *Shalala*, 12 F.3d 915, 918 (9<sup>th</sup> Cir. 1993).

15 Several of the ALJ's reasons include: (1) plaintiff's health  
16 problems did not appear severe enough to motivate him to  
17 consistently seek treatment; (2) his complaints appear to be  
18 adequately controlled by medication; (3) he has undergone  
19 conservative treatment for allegedly disabling back and right knee  
20 pain, and (4) his daily activities are inconsistent with allegedly  
21 disabling limitations (Tr. 17-18).

22 *Lack of consistent treatment.* The ALJ is correct. Plaintiff  
23 obtained very little medical treatment from onset through the date  
24 of the decision, other than with respect to hip surgery and follow  
25 up lasting less than 12 twelve months. Noncompliance with medical  
26 care or unexplained or inadequately explained reasons for failing  
27 to seek medical treatment cast doubt on a claimant's subjective  
28 complaints. *Fair v. Bowen*, 885 F.2d 597, 603 (9<sup>th</sup> Cir. 1989).

1        *Symptoms controlled by medication.* Plaintiff has taken  
2 medications for many years following pituitary gland surgery in  
3 1990. He testified these drugs cause problems on the job. Yet,  
4 plaintiff worked during nearly the entire time he took these  
5 medications, and failed to consistently complain about side  
6 effects to treating sources. Symptoms effectively controlled by  
7 medication are not disabling. *Warre v. Commissioner of Social Sec.*  
8 *Admin.*, 439 F.3d 1001, 1006 (9<sup>th</sup> Cir. 2006). Similarly,  
9 inconsistent statements diminish a claimant's credibility. See  
10 *Thomas v. Barnhart*, 278 F.3d 947, 958-959 (9<sup>th</sup> Cir. 2002).

11        *Conservative medical treatment.* Plaintiff has received  
12 conservative treatment for both lumbar and right knee problems.  
13 Conservative treatment is "sufficient to discount a claimant's  
14 testimony regarding severity of an impairment." *Parra v. Astrue*,  
15 481 F.3d 742, 750-751 (9<sup>th</sup> Cir. 2007).

16        *Activities.* Plaintiff's activities are inconsistent with  
17 claimed disabling impairments. See *Thomas*, 278 F.3d at 958-959.

18        The ALJ's reasons for finding plaintiff less than fully  
19 credible are clear, convincing, and fully supported by the record.  
20 See *Thomas*, 278 F.3d at 958-959.

21        The ALJ gave several reasons for rejecting some of Dr.  
22 Kontogianis's contradicted opinions. With respect to his February  
23 14, 2006, statement that plaintiff was unable to be employed,  
24 "especially [in] the type of work that would be performed by a  
25 pipe fitter," the ALJ agreed plaintiff is unable to perform his  
26 past relevant work. On June 27, 2006, the surgeon limited  
27 plaintiff to sedentary work, a term not defined on the form. In  
28 fact, the limits specified are consistent with the ALJ's assessed

1 RFC. Finally, the February 13, 2007, opinion was inconsistent with  
2 other substantial evidence, including Dr. Kontogianis's own  
3 observations and findings (Tr. 19), and did not reflect maximum  
4 improvement.

5 The ALJ acted in accordance with his responsibility to  
6 determine the credibility of medical evidence, and he gave  
7 specific, legitimate reasons for discrediting particular opinions.  
8 *See Matney v. Sullivan*, 981 F.2d 1016, 1019 (9<sup>th</sup> Cir 1992);  
9 *Magallanes v. Bowen*, 881 F.2d 747, 751-752 (9<sup>th</sup> Cir. 1989).

10 The ALJ properly weighed the medical evidence and plaintiff's  
11 credibility.

12 **B. Step five**

13 Plaintiff asserts the ALJ erred when he found Mr. Stredwick  
14 is able to perform light, rather than sedentary, work. If the ALJ  
15 assessed an RFC for sedentary work, plaintiff's argument  
16 continues, he would be found disabled based his RFC and age under  
17 the Grids.

18 As indicated, the ALJ properly weighed the medical evidence  
19 and assessed plaintiff's credibility, including his assessment of  
20 plaintiff's RFC. Since the ALJ's assessed RFC is without error, it  
21 is irrelevant what result would obtain if the RFC assessment  
22 differed. The ALJ's step five finding is supported by the evidence  
23 and free of legal error.

24 The ALJ is responsible for reviewing the evidence and  
25 resolving conflicts or ambiguities in testimony. *Magallanes v.*  
26 *Bowen*, 881 F.2d 747, 751 (9<sup>th</sup> Cir. 1989). It is the role of the  
27 trier of fact, not this court, to resolve conflicts in evidence.  
28 *Richardson*, 402 U.S. at 400. The court has a limited role in

1 determining whether the ALJ's decision is supported by substantial  
2 evidence and may not substitute its own judgment for that of the  
3 ALJ, even if it might justifiably have reached a different result  
4 upon de novo review. 42 U.S.C. § 405 (g).

5 The ALJ's assessment of the evidence is fully supported by  
6 the record and free of legal error.

7 **CONCLUSION**

8 Having reviewed the record and the ALJ's conclusions, this  
9 court finds that the ALJ's decision is free of legal error and  
10 supported by substantial evidence..

11 **IT IS ORDERED:**

12 1. Defendant's Motion for Summary Judgment (**Ct. Rec. 13**) is  
13 **granted.**

14 2. Plaintiff's Motion for Summary Judgment (**Ct. Rec. 11**) is  
15 **denied.**

16 The District Court Executive is directed to file this Order,  
17 provide copies to counsel, enter judgment in favor of defendant,  
18 and **CLOSE** this file.

19 DATED this 16th day of February, 2011.

20  
21 s/ James P. Hutton  
JAMES P. HUTTON  
22 UNITED STATES MAGISTRATE JUDGE  
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